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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 173

SIDNEY POLLER and JAMES G. PACE,

Petitioners,

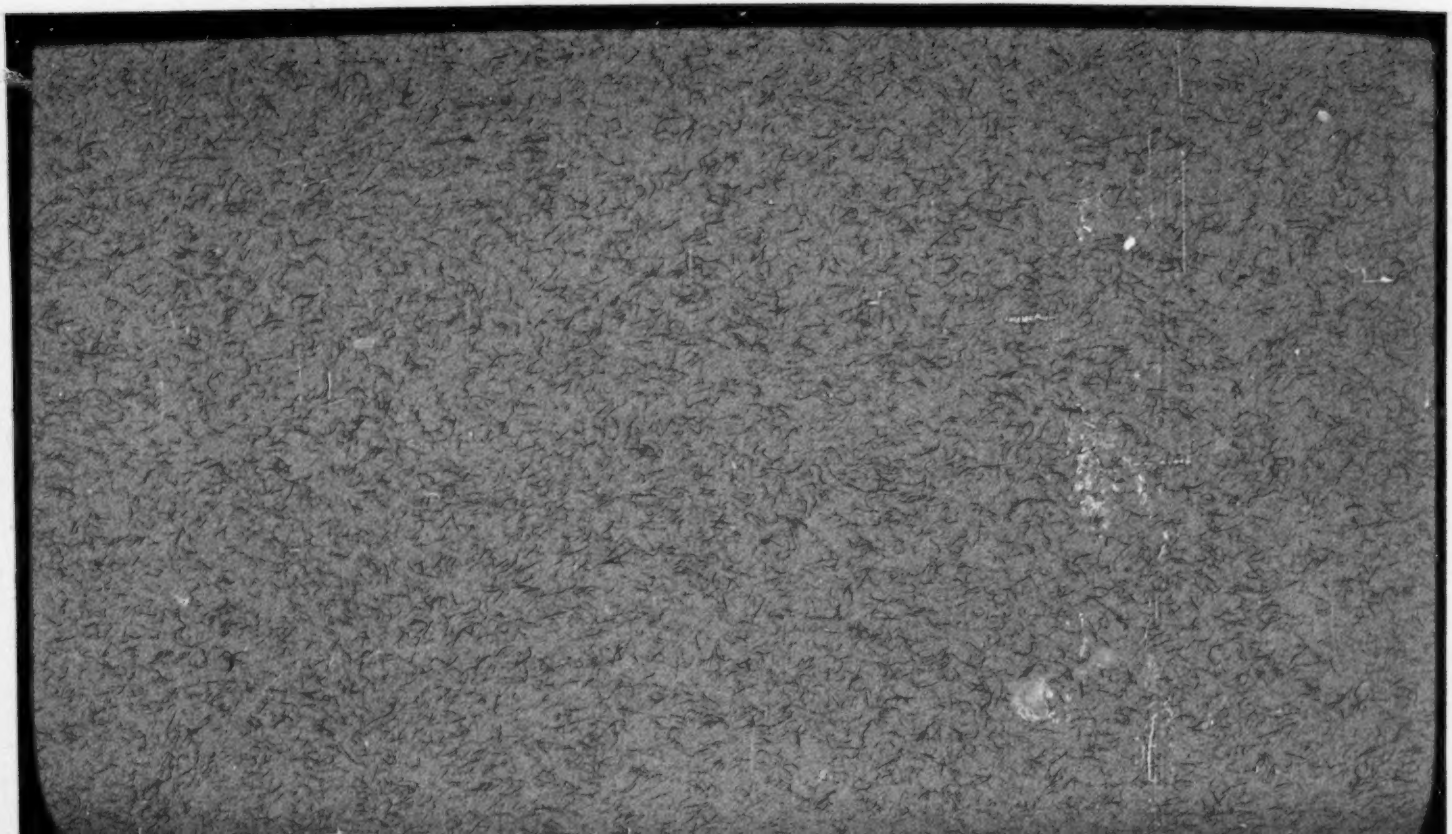
vs.

LAURIE W. TOMLINSON, Director of Internal Revenue for the State of Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES G. PACE, *Petitioner*



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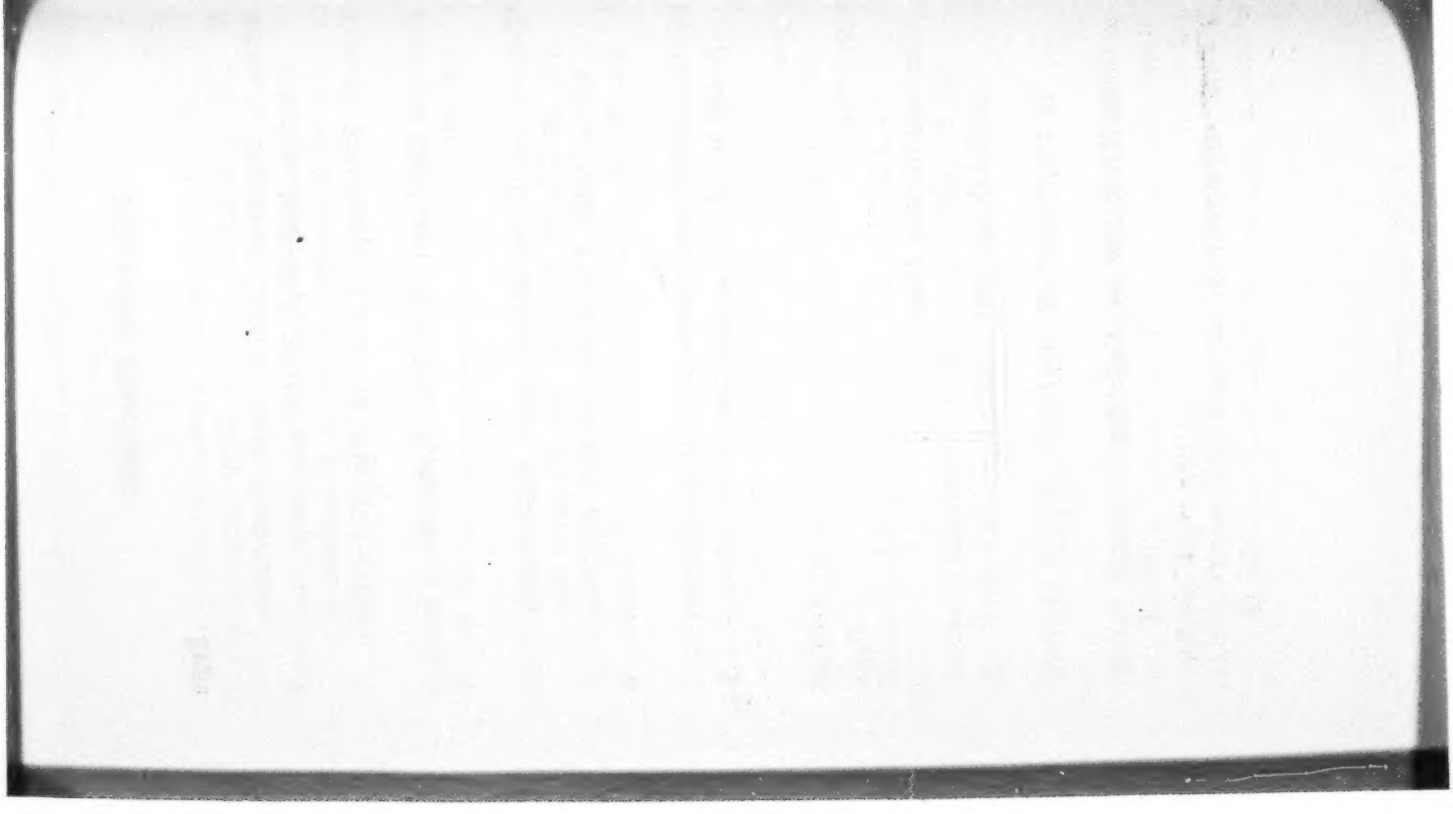

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the appeal numbered and entitled on its docket 14,967, [redacted] *Laurie W. Tomlinson, Director of Internal Revenue for the State of Florida, Appellee.* vs. Sidney Poller and James G. Pace, Appellants.

Opinions Below

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals is unreported at the time of printing this petition. The opinion is printed in Appendix II, Page 1.

Jurisdiction

The judgment below was entered on March 25th, 1955. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Questions Presented

1. Was the order of the district court substituting a bond for a tax lien pending the prosecution of a suit by petitioner to permanently enjoin the collection of withholding taxes a final decision in which an appeal would lie under 28 U. S. C. A. Section 1291?

2. Did the district court have jurisdiction to replace with a bond the property of petitioner being subject to the payment of the tax?

Statutes Involved

28 U.S.C.A. Section 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the

District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655, Sec. 48, 65 Stat. 726."

26 U.S.C. 1946 ed., Sec. 3653:

"Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

26 U.S.C. Sec. 3673:

"Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribed, the collector charged with an assessment in respect of any tax, may issue a certificate of release of the lien it - - - - -

"(b) Bond Accepted. - - - There is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations."

Statement

On October 2, 1953, the District Director of Internal Revenue for the Southern District of Florida filed against the Appellees, Sidney Poller and James G. Pace, a tax lien for withholding taxes, Federal Insurance Contribution Act taxes and Federal Unemployment Act taxes in the

amount of Two Thousand Three Hundred Fifty-eight and 22/100 Dollars ($2,358.22), together with interest and penalties. The amount of taxes was based upon returns filed by the General Engineering Company for the last quarter of 1949 and the first quarter of 1950.

At no time during the operation of the General Engineering Company were the Appellees officers or directors of that corporation but were merely agents and representatives of the creditors of the corporation.

No attempt was made by the Director of Internal Revenue to determine whether the Appellees were liable for the aforesaid tax, nor was a hearing granted to the Appellees for the determination of the liability. The Appellees are attorneys at law, members of the Florida Bar and Federal Bar and enjoy a good reputation which has been damaged and besmirched by the action of the Appellant. As a result of the filing of the tax lien, title to certain property held by the Appellee, James G. Pace, as trustee for his clients, became clouded and unmarketable.

As a result thereof, the Appellees, on October 16, 1953, brought an action in the District Court for the Southern District of Florida to permanently enjoin the collection of the aforementioned taxes assessed against them. They also made a motion for a preliminary injunction and the Government filed a cross-motion to dismiss. Both motions were denied by order of the District Court, entered on October 30, 1953.

Appellee, James G. Pace, then filed a petition with the District Court on November 25, 1953 asking that he be permitted to file a surety bond for the purpose of releasing

the tax lien and alleged that the Director of Internal Revenue refused to accept a bond other than that which would admit liability for the contested assessment, which would work as a waiver of any rights which the Appellee, James G. Pace, might have under his original complaint. The petition prayed that the Court enter an order requiring the Director to accept the bond as tendered by the Appellee. At the hearing upon this petition, it was shown to the satisfaction of the Court that the Appellee was holding certain property in trust for various clients and that the lien clouded the title to said property and made it unmarketable. As a result thereof, Appellee's reputation was damaged and besmirched and the seizure and sale of the property which was held in trust would inevitably have ruined his reputation and law practice and inflict a loss for which he has no adequate remedy at law.

By an order entered December 8, 1953, the District Court approved the bond, ordered it filed and directed that notice of lien previously filed in the office of the Clerk of the Circuit Court of Dade County, Florida be cancelled. It was further ordered that in the event any tax shall be found to be due, after litigation on the merits of the case, such tax shall be collected from the bond and said bond shall replace the property of the Appellee being subject to the tax.

Appeal was taken to the Court of Appeals for the Fifth Circuit on January 7th, 1954, and on January 24th, 1955 a motion was filed to dismiss the appeal for lack of jurisdiction. That court rendered its opinion on March 25th, 1955, reversing the order of the District Court and ordering that the lien be reinstated.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in conflict with the well-established jurisprudence of this Court and of Courts of Appeals in other Circuits, that for purposes of an appeal a decree is final when it disposes of the entire controversy between the parties. *Deslions v. La-Compagnie*, 210 U.S. 95, 52 L. Ed. 973; *Balboa Shipping Co. v. Standard Fruit & S. S. Co.*, (C. A. 2nd 1950) 181 F. 2d 109; *Allen B. Wrisley Distributing Co. v. Serewicz*, (C.C.A. 7th 1946) 158 F. 2d 721; *Turnbull v. U.S.*, (C.C.A. 6th 1943) 139 F. 2d 126; *Jacobsen v. Jacobsen*, (C.A. of D.C. 1942) 126 F. 2d 12, 75 U.S. App. D.C. 223; *Gillespie v. Schram*, (C.C.A. 6th 1939) 108 F. 2d 192; *Southland Industries v. Federal Communications Commission*, (C.A. of D.C. 1938) 99 F. 2d 117, 69 App. D.C. 82; *Beighle v. LeRoy*, (C.C.A. 3rd 1938) 97 F. 2d 30; *Cox v. Graves, Knight & Graves, Inc.*, (C.C.A. 4th 1932) 55 F. 2d 217; *Collins County National Bank v. Hughes*, (Colo. 1907) 152 F. 414, 81 C.C.A. 556; *Morgan v. Thompson* (Ind. T. 1903) 124 F. 203, 59 C.C.A. 672; *Howell v. Terminal R. Ass'n. of St. Louis*, (C.C.A. 8th 1946) 155 F. 2d 907; *Kuhn v. Canteen Food Service*, (C.C.A. 7th 1945) 150 F. 2d 55; *Masterson v. Howard*, (Tex. 1870) 10 Wall. 416, 19 L. Ed. 953; *Merriman v. Chicago, etc., R. Co.*, (Ill. 1894) 64 F. 535, 12 C.C.A. 275. See also: *Weston v. Charleston*, (S.C. 1829) 2 Pet. 449, 7 L. Ed. 481; *Catlin v. U.S.*, (Ill. 1945) 65 S.Ct. 631, 324 U.S. 229, 89 L. Ed. 911; *Clark v. Kansas City*, (Kan. 1889) 18 S.Ct. 207, 172 U.S. 334, 43 L. Ed. 467; *Benjamin v. Buobis*, (Dist. Col. 1886) 6 S.Ct. 925, 118 U.S. 46, 30 L.Ed. 52; *Winthrop Iron Co. v. Meeker*, (Mich. 1883) 3 S.Ct. 111, 109 U.S. 180, 27 L. Ed. 898; *Ex parte Norton*, (La. 1883) 2 S.Ct. 490, 108 U.S. 237, 27 L. Ed. 709; *St. Louis I.M. & S.R. Co.*

v. Southern Exp. Co., (Mo. 1883) 2 S.Ct. 6, 108 U.S. 24, 27 L. Ed. 638; *Bostwick v. Brinckerhoff*, (N.Y. 1882) 1 S.Ct. 15, 106 U.S. 3, 27 L. Ed. 73; *Beebe v. Russell*, (Ark. 1857) 19 How. 283, 15 L. Ed. 668; *Asher v. Ruppa*, (C.A. 7th 1949) 173 F. 2d 10; *R.F.C. v. Katz*, (C.C.A. 9th 1916) 156 F. 2d 215; *Baltimore & O. R. Co. v. United Fuel Gas Co.*, (C.C.A. 4th 1946) 154 F. 2d 545; *Dowling Bros. Distilling Co. v. U. S.*, (C.C.A. 6th 1946) 153 F. 2d 353, certiorari denied 66 S.Ct. 1120, 328 U.S. 848, 90 L. Ed. 1622, rehearing denied 67 S.Ct. 29, 329 U.S. 820, 91 L. Ed. 698; *Parker v. U.S.*, (C.C.A. 1st 1946) 153 F. 2d 66, 163 A.O.R. 379; *State of Washington v. U.S.*, (C.C.A. 9th 1936) 87 F. 2d 421; *Werner v. Zintmaster*, (C.C.A. 3rd 1935) 77 F. 2d 74; *Cole v. Rustgard*, (C.C.A. Alaska 1933) 68 F. 2d 316; *Watson v. Employers' Liability Assur. Corporation*, (D.C. Tex. 1928) 23 F. 2d 682; *Sullivan v. Associated Billposters and Distributors of United States and Canada*, (C.C.A. 2nd 1925) 6 F. 2d 1000; *Wright v. Taft Peirce Mfg Co.*, (C.C.A. 1st 1923) 287 F. 131; *France & Canada S.S. Co. v. French Republic*, (C.C.A. 2nd 1922) 285 F. 290, certorari denied 43 S.Ct. 361, 261 U.S. 615, 67 L. Ed. 828; *U.S. v. Bighorn Sheep Co.*, (C.C.A. 10th 1921) 276 F. 710; *National Brake, etc. Co. v. Christensen*, (Wis. 1919) 258 F. 880, 169 C.C.A. 600, reversed on other ground 41 S.Ct. 154, 254 U.S. 425, 65 L. Ed. 341; *Baxter v. Bevil Phillips & Co.*, (D.C. Ala. 1914) 219 F. 309; *Sheppy v. Stevens*, (N.Y. 1912) 200 F. 946, 119 C.C.A. 220; *Maas v. Lonstorf*, (Mich. 1908) 166 F. 41, 91 C.C.A. 627; *Morrison v. Burnette*, (Ind. T. 1907) 154 F. 617, 83 C.C.A. 391, appeal dismissed 29 S.Ct. 394, 212 U.S. 291, 53 L. Ed. 517; *Scriven v. North*, (Md. 1904) 134 F. 366, 67 C.C.A. 348; *Morgan v. Thompson*, (Ind. T. 1903) 124 F. 203, 59 C.C.A. 672; *Carmichael v. Texarkana*, (Ark. 1902) 116 F. 845, 54 C.C.A. 179; *Sanders v. Blue-*

field Waterworks & Improvement Co., (W.Va. 1901) 106 F. 587, 45 C.C.A. 475; *Edgell v. Felder*, (Ga. 1900) 99 F. 324, 39 C.C.A. 540; *Mackaye v. Mallory*, (N.Y. 1897) 79 F. 1 25 C.C.A. 420; *Talley v. Curtain*, (Va. 1893) 58 F. 4 7 C.C.A. 1; *Robinson v. Belt*, (C.C.A. Ind. T. 1893) 56 F. 328, 5 C.C.A. 521; *Judson v. Courier Co.*, (D.C. N.Y. 1885) 25 F. 705.

In the instant case, the major controversy between the parties as to whether the assessment is illegal and whether the circumstances warrant a permanent injunction against collection, has yet to be disposed of on its merits in the District Court. All that the order of the District Court did, and rightly so, was to substitute one form of property for another to insure the collection of taxes if found due. Accordingly, the order is an interlocutory one and in no way, by the wildest imagination, does it dispose of the entire controversy between the parties.

The principle authorities which the Court of Appeals relied upon in concluding the order was appealable are *Swift & Co. et al v. Compania Caribe*, 339 U.S. 684, and *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541. The District Court in the *Cohen* case denied a motion to require the Plaintiff to give security as provided in a state statute, in a stockholders derivative action. The decision by the Supreme Court that the order was appealable turned on the point that rights conferred by the state statute would have been irreparably lost before the order could be merged in the final judgment. This Court went on to say, "We hold this order appealable because it is a final disposition of a claim right which is not an ingredient of the cause of action and does not require consideration with it. But we do not mean that every order fixing the security is

subject to appeal. Here it is the right to security that presents a serious and unsettled question."

In the *Swift & Co.* case, the trial court had dismissed an attachment in aid of a liable against a ship alleged to belong to the respondent, the main action being continued for trial on the issue of liability and on other important issues. This Court, in holding that the order dismissing the attachment was appealable, stated, "Appellant review of the order dissolving the attachment at a later date would be an empty right after the vessel had been released and the restoration of the attachment only theoretically possible * * * Under these circumstances the provision for appeals only from final decisions in 28 U.S.C.A. Section 1291, F.C.A., Title 28 Section 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigous process.

* * * The situation is quite different where an attachment is upheld pending determination of the principle claim. Such was *Cushing v. Laird*, 107 U.S. 69, 27 L. Ed., 2 S.Ct. 196, which is urged on us. In such a situation, the rights of all the parties can be adequately protected while the litigation on the main claim proceeds."

It is apparent from the above cases that where an order deprives a party of a right which may result in an irreparable loss while litigation on a major issue proceeds, such an order is appealable.

The situation in the instant case, however, is quite different. The order of the District Court releasing the lien for a bond in its stead merely substituted one form of security for another and thereby gave adequate protection

for the rights of all parties pending the litigation on the main issue. Admittedly, if the order just provided for a release of the lien without some form of security for the collection of tax if found due, then in that case the authorities relied upon by the Court of Appeals would be applicable.

2. The decision of the Court of Appeals violates the purpose of requiring finality of decisions which is to prevent unnecessary expense and delays of repeated appeals in the same suit and to have the whole case and every controversy in it decided in the same appeal. *City of Louisa v. Leve*, (C.C.A. 6th 1944) 140 F. 2d 512; *City of Morgantown, W.Va. v. Royal Ins. Co.* (C.A. 4th 1948) 169 F. 2d 713; *U.S. v. Kansas City, Kan.*, (C.C.A. 10th 1947) 159 F. 2d 125; *Audi Vision, Inc. v. R.C.A Mfg. Co.*, (C.C. A. 2nd 1943) 136 F. 2d 621, 147 A.L.R. 574; *Shultz v. Manufacturers & Traders Trust Co.*, (C.C.A. 2nd 1939) 103 F. 2d 771; *Satterlee v. Harris*, (C.C.A. 10th 1932) 60 F. 2d 490; *Scriven v. North*, (Md. 1904) 134 F. 366, 67 C.C.A. 348.

3. The decision of the Court of Appeals is in conflict with the salutary and well-established rule that where there exists special and extraordinary circumstances sufficient to bring a case within some acknowledged head of equity jurisprudence, the Courts may restrain collection. *Miller v. Standard Nut Margarine, Co.*, 284 U.S. 498, 79 L. Ed. 422; *Hill v. Wallace*, 259 U.S. 44 66 L. Ed. 822; *Rickert Rice Milling Co. v. Fontenat*, 297 U.S. 110; 80 L. Ed. 513; *State Railroad Tax Cases*, 92 U.S. 575; *Dows v. City of Chicago*, 11 Wall. 108; *Hannewindle v. Georgetown*, 15 Wall. 547.

The Court of Appeals, in rendering its decision, adopted the contention of respondent that the order of the District Court in effect is in the nature of a permanent injunction and therefore is contra to Section 3653 of the Internal Revenue Code. It is urged by the petitioner first, that the order in no way enjoins the Director of Internal Revenue from proceeding to collect the tax. It merely substitutes one form of property for another to secure payment of any tax liability. The order expressly provides that "In the event any tax shall be found to be due defendant by plaintiff, such tax shall be collected from the bond, and said bond shall replace the property of the plaintiff being subject to this tax."

However, even if the order were in the nature of a permanent injunction, the District Court would still have jurisdiction. Since the circumstances in the instant case, as evidently shown to the satisfaction of the District Court at the time of hearing on the petition for the order, clearly brings the case within the rule established by the Supreme Court in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 and by subsequent decisions that Section 3653 of the Internal Revenue Code is general in its terms and should not be construed as abrogating the equitable principals which permit suits to restrain collection where the exaction is illegal and there exists special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence. The broad prohibition of Section 3653 of the Internal Revenue Code against the maintenance of any suit to restrain collection of any taxes is directed at the person liable for taxes and is not intended to preclude the Courts from affording protection to one not liable for the taxes whose property may be in danger of seizure and sale by the taxing author-

ities. See *Adler v. Nicholas*, (C.C.A. 10th, 1948) 166 Fed. 2d 674; *Hubbard Investment Co. v. Brast*, (C.C.A. 4th 1932) 59 Fed. 2d 709; *Tower Production Co. v. U.S.* (D.C. Okla.) 61 Fed. Supp. 641; *National Iron Bank v. Manning*, (D.C. N.J.) 76 Fed. Supp. 841.

There is no factual or legal basis to hold that the appellee is liable for the tax. Section 1623 of the 1939 Internal Revenue Code provides that the employer shall be liable for withholding taxes. Here the General Engineering Company is the employer. Therefor, said company is liable for the taxes. Apparently, the Director of Internal Revenue proceeded on the theory that the petitioner was in control of the wages and therefore was acting as a fiduciary. The only ground for such an assumption must have been the fact that the appellee was one of the agents for creditors of the General Engineering Company. Certainly, this fact alone cannot support such an assumption. There was no attempt made to determine whether the appellee was in control of the wages. Admittedly, if the appellee was an officer or director of the General Engineering Company, then the Director may have had a basis in which to act. However, this was not the case.

The action of the Director therefor was a mere tolerable and frivolous pretense that his action was in compliance with his official duty. The effect of the assessment consequently was to charge the appellee with the payment of the General Engineering Company's tax indebtedness. It was a mere effort to subject the property of a legal stranger to the payment of a tax. The unjust and arbitrary character of the exaction is therefor manifest; and when taken into consideration with the fact that the seizure and sale of certain property which the appellee held

in trust for others would inevitably have ruined his law practice and inflict a loss for which he has no adequate remedy at law, there can be no difficulty in finding the special and extraordinary circumstances which takes this case outside the scope of the prohibitory statute and justifies relief in a Court of Equity.

It is manifest that the appellee was not afforded an adequate remedy at law through the one method of judicial review available to him; that is, to permit his property to be sold and that of others to become clouded and unmarketable and then sue in the Courts of recovery since the losses consequent upon the interference with his business and the forced sale of the property would be irreparable.

It is equally clear that the appellee was not in a position to make use of the additional remedy offered by Section 3673 of the Internal Revenue Code under which liens may be released by submitting a bond to the Director which admits the liability of taxes due.

Further, the contention, as originally submitted by respondent, that the District Court had no jurisdiction to release the lien and substitute a bond in its stead upon the ground that the bond does not conform to the terms of Section 3673 of the Internal Revenue Code, is untenable. Needless to argue that Section 3673 of the Internal Revenue Code merely renders discretionary power upon the Director of Internal Revenue and does not limit the equitable powers of the District Court. Further, Section 3673 of the Internal Revenue Code is obviously applicable only in cases where no question about the legality of the tax assessment is pending judicial determination. However,

in the instant case, the legality of the assessment has yet to be determined. Therefore, the aforesaid contention must fall.

4. The importance of 28 U.S.C. Section 1291, makes it highly desirable that the provisions thereof be properly construed and applied, and a decision, such as that of the Fifth Circuit, so obviously in violation of the provisions thereof should be corrected without delay.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES G. PACE, *Petitioner*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14967

LAURIE W. TOMLINSON, Director of Internal Revenue for the State of Florida,

Appellant,

versus

SIDNEY POLLER and JAMES G. PACE,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(March 25, 1955.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: The question here presented is whether the District Court for the Southern District of Florida erred in entering an order requiring the Director of Internal Revenue for the State of Florida to accept a bond in lieu of a recorded lien against appellees, which bond was conditioned entirely differently from

the bond prescribed by statute and normally used by the Commissioner of Internal Revenue, in his discretion, and directing that the tax lien be cancelled from the records of Dade County, Florida, pending the prosecution of a suit by appellees to enjoin the collection of a social security tax which they had returned; and there is the further threshold question whether such an order is a "final decision" of the District Court under 28 U.S.C.A. §1291, or is such "an interlocutory order" under §1292, as gives this court jurisdiction on appeal.[1]

This action was brought by the appellees to enjoin the collection of Federal Insurance Contributions Act taxes assessed against them in the amount of $2,358.22.

The allegations of the complaint filed on October 16, 1953, may be summarized as follows:

During the year 1949, and until April 11, 1952, the appellees and one L. H. Quigley acted as members of a committee for the benefit of the creditors of General Engineering Company, now bankrupt and dissolved, and

1 28 U.S.C.A. §1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655, § 48, 65 Stat. 726."

28 U.S.C.A. §1292:

"1292. INTERLOCUTORY DECISIONS

The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * * *"

as such carried on the activities and functions of that corporation.

Pursuant to the requirements of the Internal Revenue Code the appellees filed various employer's quarterly federal tax returns for the last quarter of 1949 and the first quarter of 1950, reporting, FICA taxes in the total amount of, $2,358.22.

During the operation of General Engineering Company the appellees were at no time actual officers or directors of that corporation but were merely acting as agents and representatives of the creditors of the corporation for the mutual benefit of all parties concerned.

On October 2, 1953, the Director wrongfully filed against the appellees a tax lien for the taxes reported by them in the amount of $2,358.22 and has demanded payment of that amount with interest and penalties. The appellees had no notice of the making of the assessment until October 2, 1953, when notice of lien was filed by the Director in the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida.

The assessment is clearly erroneous as the statute of limitations had run prior to its making and was capricious and without foundation in fact or law.

The appellees are attorneys at law, members of the Florida Bar and Federal Bar and enjoy a good reputation which has been damaged and besmirched by the actions of the defendant. The appellees are active in purchasing and selling real estate in Dade County, Flor-

ida, and as a result of the filing of the notice of lien, title to property not specified has become clouded and unmarketable.

Upon these allegations the appellees prayed that the court grant a temporary injunction and after trial a permanent injunction.

The appellees moved for a preliminary injunction which the court denied by order entered October 30, 1953. This order provided that the case would not be dismissed but that the Director would be required to answer.

On November 25, 1953, the appellee Pace filed a petition to file a bond for the purpose of releasing the federal tax lien referred to in the complaint, alleging that he had tendered to the Director a bond pursuant to Section 3673 of the Internal Revenue Code which the Director refused to accept; that the Director requested the appellee Pace to file a bond on Treasury Form 1131, which the appellee Pace refused to do because the effect of filing a bond upon the form requested would be to admit liability for the contested assessment and would work as a waiver of any rights which the appellee Pace might have under his original complaint. This petition prayed that the court enter an order requiring the Director to accept the bond as tendered by the appellee, a copy of which was attached to this petition.

On December 8, 1953, after hearing upon this petition, the District Court entered an order that the bond tendered by the appellee Pace be approved and that the notice of lien filed in the office of the Clerk of the Cir-

cuit Court of Dade County, Florida, be cancelled and be of no further force and effect.

No defensive pleadings were filed by defendant, and no intervention was sought by the United States at the time of the order complained of, but on December 23rd a stipulation was entered giving the defendant sixty days additional time to plead.

This appeal was taken by the Director of Internal Revenue on January 7, 1954.

While no motion to dismiss the appeal has been filed, appellees' brief is directed solely to the question whether the order complained of is appealable under the appropriate federal statutes giving to this court the limited jurisdiction which it enjoys. We, of course, must always consider the question of our jurisdiction even though it is not raised by special motion to dismiss.[2]

The substance of appellees' contention is that, no matter how erroneous may have been the order of the trial court striking the lien from the records of Dade County and requiring the Director to accept what really amounted only to a supersedeas bond rather than a payment bond as is alone authorized by the Statute, the order was not a final judgment and thus it is not appealable. We are not aided overmuch by the briefs of the parties in connection with this particular question, but we do find two Supreme Court decisions that we think requires us to reject this contention.[3] These cases construe the term

2 Falsone v. United States, 5th Cir., 205 F. 2d 734, 737, cert. denied 346 U. S. 864, 74 S. Ct. 103; 98 L. Ed. 375.

3 Swift & Co. et al v. Compania Caribe, 339 U. S. 684; Cohen v. Beneficial Loan Corp., 337 U. S. 541.

"final decision" as meaning something different than "final judgments which terminate an action." They construe it in a manner that includes decisions that fall in "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." **Cohen v. Beneficial Loan Corp., supra,** page 546.

The foregoing language is adopted by the Supreme Court in the subsequent case of *Swift & Co. v. Compania Caribe, supra.* There the trial court had dismissed an attachment in aid of a libel against a ship alleged to belong to respondent, the main action being continued for trial on the issue of liability, and other important issues, including a claim of a fraudulent transfer of the libeled ship. The Supreme Court, holding that an appeal from the order dismissing the attachment would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible, has given us clear direction as to how to treat the trial court's release of the lien of the United States here and the substitution of an inadequate bond. The evil complained of by the Government, and rightly, we think, assuming the order to have been erroneous, is that the Government is illegally delayed in the collection of its taxes until after the taxpayer litigates the question as to their correctness. The action of the trial court, by its order appealed from, definitely, finally and completely achieves that illegal result if, *ex hypothesi*, its decision was erroneous. The decision was as to a matter entirely disconnected with the principal contention of the tax-

payers in the pending suit. There they contended that the alleged assessment was invalid and they sought the court's determination of that question and sought an injunction against the collection of the tax pending that determination. That matter still stands for trial in the court below.

To obtain ancillary relief appellant filed a motion as described above, requesting the court's order complained of. This order constitutes a final decision on that ancillary matter to the effect that the United States must have its lien removed from the county records. No further action is contemplated by the parties as to this matter upon a final trial. It is complete; it is final. We hold that an appeal from such an order is within the jurisdiction of the court under the direct authority of the cited cases. In so doing we expressly state that nothing in this opinion or decision is intended to enlarge the definition of finality beyond that there announced by the Supreme Court.

As to the error complained of, the decision is, we think so plainly and palpably wrong as to require little discussion. In the first place, as was conceded by counsel for appellees in oral argument before us, the complaint does not now set out a cause of action for enjoining the collection of the taxes involved. It is clearly and directly in violation of the express terms of the federal statute that denies to the courts the power to restrain the collection of a federal tax.[4] The exceptions in the statute

[4] 26 U.S.C.A. §3653: "PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

"(a) Tax.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

quoted in the footnote relate to cases in which the Commissioner or Director of Internal Revenue proceeds to assess or collect a tax when the liability for its payment is being contested by appropriate proceedings in the Tax Court of the United States. They are clearly not applicable to the situation here present.

It is entirely contrary to our scheme of federal taxation for a taxpayer to be permitted to hold up the payment of his taxes by enjoining their collection while he contests his liability for such payment, except in the particular manner described in the statute.[5]

To be sure, the trial court did not enjoin the collection of the tax, but it required the Director to release the lien of the United States upon the tender of a bond by the taxpayers which simply stood for the payment of the tax if, after promptly pursuing the litigation, it was judicially determined that the tax was due. In all logic, such a decision of the District Court made it a practical impossibility for the Director to proceed by levy and distraint against the property of the taxpayers, since the Director would be acting at his peril in view of the announced attitude of the court as embodied in his order. It is difficult to see how the District Court could logically fail to sustain a suit against the Director or his deputy for an illegal levy and sale, if made while the bond was still in effect, in the light of the court's holding that the taxpayers have the right to have their li-

[5] For a discussion of the principles involved see State Railroad Tax Cases, 92 U.S. 575, 613-614; for decisions of this court see Steinhagen Rice Milling Co. v. Scofield, 5th Cir., 87 F. 2d 804 and Beeland Wholesale Co. v. Davis, 5th Cir., 88 F. 2d 447, cert. den. 300 U. S. 680.

ability for the tax judicially determined before the lien would be recognized.

Furthermore, the court erred equally plainly in ordering the Director to accept a bond at all in the light of the express provisions of the statute making this a discretionary matter with the Director of Internal Revenue for the State of Florida. Since the tax lien that had been placed of record in Dade County was specifically authorized by the federal statute, it could be released only in accordance with the provisions of the statute.[6]

Not only can the lien of the United States for taxes be lifted only as provided by the statute,[7] but also the form of the bond is also prescribed and the court erred additionally in directing that a bond be accepted by the Director which completely failed to conform to the statutory requirement that the bond be "conditioned upon the payment of the amount assessed" The bond authorized by the court's order was conditioned "if the said principal shall successfully contest said assessment in the United States District Court or in the Tax Court of the United States, or shall pay said obligation . . . " It is too

[6] 26 U.S.C.A. §3673: "RELEASE OF LIEN.

"Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax, may issue a certificate of release of the lien if—

* * * * *

"(b) Bond accepted.—There is furnished to the Collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions and form of the bond and sureties thereon, as may be specified in the regulations.

"(26 U.S.C. 1946 ed., Sec. 3673.)"

[7] Metropolitan Life Ins. Co. v. United States, 107 F. 2d 311, 6th Cir., cert. den. 310 U. S. 630.

apparent for argument that this bond utterly failed to meet the essential requirements of the statute.

The errors complained of having occurred in the entering of a final decision by the trial court, the said decision is hereby reversed with directions that the lien heretofore recorded in the records of Dade County, Florida be reinstated, and for further action by the trial court consistent with this opinion.

REVERSED and REMANDED.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT.

Extract from the Minutes of March 25, 1955.

LAURIE W. TOMLINSON, Director of Internal Revenue for the State of Florida,

No. 14967. versus

SIDNEY POLLER and JAMES G. PACE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions that the lien heretofore recorded in the records of Dade County, Florida be reinstated, and for further action by the trial court consistent with the opinion of this Court.